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No. 07-1609

IN THE

Supreme Court of the United States

CARL GORDON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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REPLY BRIEF OF PETITIONER

The Government's brief in opposition offers no persuasive reason for denying certiorari. The decision below conflicts with the decisions of other circuits is wrong on its merits, and potentially impacts thousands of defendants.

The Government acknowledges that the circuit courts disagree on the question presented, but attempts to minimize the scope of the split and its importance by characterizing the conflict as merely a "contrast" in "language" with little "practical significance." Br. in Opp. 5. The Government also asserts that this case is not a suitable vehicle for resolving the conflicting approaches because the result in this case would be the same regardless of the applicable law. *Id.* at 10-12. Both arguments are wrong.

There is a clear and fundamental difference between the Seventh Circuit's subjective "actual discovery" standard for statute of limitations challenges to the illegal reentry statute and the objective "constructive knowledge" standard established by five other courts of appeals. The different standards have very profound consequences for defendants, law enforcement officers, and courts, and this case is an ideal vehicle for resolving which of the two standards is correct under 8 U.S.C. § 1326 and 18 U.S.C. § 3252.

I. THE DECISION BELOW CREATED A FUNDAMENTAL SPLIT AMONG THE CIRCUITS ON A QUESTION THAT DETERMINES WHETHER TENS OF THOUSANDS OF DEFENDANTS ARE PROTECTED BY THE FEDERAL CRIMINAL STATUTE OF LIMITATIONS.

The Government concedes, as it must, that the Court of Appeals for the Seventh Circuit has adopted a legal standard for when the statute of limitations begins to run in cases of illegal reentry that is expressly different than the legal standard adopted by the Courts of Appeals for the Second, Third, Fifth, Eighth, and Eleventh Circuits. *See* Br. in Opp. 6.

In the Seventh Circuit, the offense of being "found in" the United States is a continuing offense that lasts as long as an illegal alien remains in the country, even when the Government reasonably should know of the alien's illegal return. If the statute of limitations applies at all under this standard, it could not be triggered until the *subjective* moment when immigration authorities actually know of an alien's illegal presence, and may not begin until the point of arrest. Pet. App. 13a. Constructive knowledge of an alien's illegal presence in the United States is irrelevant to any calculation of the statute of limitations. Pet. App. 14a.

The five other courts of appeals to address the issue, by contrast, have held that the offense of being "found in" the United States is complete, and the statute of limitations is triggered, at an *objectively* determined point of discovery: the moment immigration authorities know of the violation *or could have*, through the exercise of diligence typical of law

enforcement authorities, discovered the violation.[1] *See, e.g., United States v. Gomez*, 38 F.3d 1031, 1037 (8th Cir. 1994).

By calling this distinction merely a "contrast" in "language" with no "practical significance," the Government glosses over the fundamental and important differences between the Seventh Circuit's subjective standard and the objective standard the other circuits have established.

First, the choice between an objective standard and a subjective standard in the statute of limitations context frequently equates to a choice between two dramatically different dates of accrual for the statute of limitations. In *United States v. DiSantillo*, 615 F.2d 128 (3d Cir. 1980), one of the cases discussed at length by the Government, the constructive knowledge standard meant that the statute of limitations began to run on March 23, 1970, while the actual knowledge standard meant the statute of limitations began to run six years later, on February 24, 1976. In *United States v. Gomez*, another case cited at length by the Government, the two different standards meant a statute of limitations date of July 2, 1988, versus February 3, 1993. 38 F.3d at 1033.

The same is true here. As the Court of Appeals explained, the difference between actual discovery and the *Government's own view* of constructive knowledge is nothing less than four years and nine months (August 10, 2001 versus April 21, 2006); the difference

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[1] The Government questions whether the Third Circuit has since repudiated its holding in *DiSantillo* and adopted an actual knowledge test similar to the Seventh Circuit's. Br. in Opp. 10-11. Even if true, that would leave the split on this question at four-two rather than five-one, all the more reason to grant certiorari and resolve this disagreement.

between actual discovery and Mr. Gordon's view of constructive knowledge is more than ten years (November 1995 versus April 21, 2006). Pet. App. 2a-3a.

Second, the practical significance of the two different legal standards extends far beyond the particular results in a small set of published appellate court opinions. The Government's argument that there is no practical significance between the two standards is premised entirely on the fact that most of the published appellate court opinions applying the constructive knowledge test have found, based on the particular facts of those cases, that the statute of limitations did not expire before the defendant was indicted. Br. in Opp. at 7-9. The fact remains, however, that those courts were applying a different standard than the court below in this case, and that those different standards are meaningful to courts, defendants, and law enforcement officers.

Indeed, looking only at the results of a few closely-contested, published appellate court opinions says nothing about the real-world impact of the two different standards at issue. The Government does not contest the sheer volume of illegal reentry prosecutions in the United States. Illegal reentry is the second most frequently prosecuted federal offense in the United States. Pet. 11. The Government's narrow view of significance does not address the number of illegal reentry prosecutions that are never brought because the Government realizes that the statute of limitations has passed, or the number of indictments that are dismissed by courts without opinion on statute of limitations grounds. Nor does it recognize the number of border agents and prosecutors who

exercise greater diligence knowing that their negligence or delay will jeopardize a criminal prosecution.

Anecdotally, counsel of record, a former federal public defender in Chicago for less than five years, raised the statute of limitations defense to an illegal reentry prosecution three times in that span. In one case, *United States v. Fernando Munguia-Rangel*,[2] the Government moved to dismiss the indictment after it was proven that Mr. Munguia-Rangel provided his true identity and fingerprints to the INS on an application for citizenship more than five years before he was indicted.[3] No published opinion exists for that case, but the two different standards made the difference. Under the current law in the Seventh Circuit, Mr. Munguia-Rangel's challenge would fail; neither the court nor the Government would have had a reason to dismiss his indictment. In any of the other five circuits, however, his indictment would be dismissed.

Finally, lost in the debate over practical significance is perhaps the most fundamental difference between the objective, constructive knowledge standard and the subjective, actual knowledge standard: the former is supported by law, while the latter is not. The law in the Seventh Circuit effectively eliminates 18 U.S.C. §3282 from the

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[2] *See United States v. Munguia-Rangel*, 03-CR-1142 (N.D. Ill. Apr. 21, 2004) (Order granting Motion to Dismiss and dismissing indictment with prejudice) (Guzman, J.).

[3] The *Munguia-Rangel* indictment was dismissed before the Seventh Circuit Court of Appeals rejected the constructive knowledge standard in *United States v. Are*, 498 F.3d 460 (7th Cir. 2007), and *United States v. Gordon*, 513 F.3d 659 (7th Cir. 2008).

Criminal Code for "found in" prosecutions because it essentially holds that nothing short of the Government's decision to arrest or prosecute the offender will trigger the statute of limitations.[4] Until that point, the Government is free to overlook and condone the alien's illegal presence—without limitation—and thereby prolong the offense indefinitely. The crime can continue for as long as the authorities choose not to enforce the law. Noticeably absent from the Government's brief in opposition is any attempt to justify the Seventh Circuit's subjective standard as reasonable, or even colorable under the language of either the illegal reentry statute or the statute of limitations—let alone correct.

This Court has repeatedly stated its preference for enforcing constitutional rights and criminal laws through objective legal standards. *See, e.g., Devenpeck v. Alford*, 543 U.S. 146, 154-55 (2004) ("Subjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest."); *Williams v. Taylor*, 529 U.S. 362, 409-410 (2000) (when determining whether a federal law has been reasonably applied, a "federal habeas court should not transform the inquiry into a subjective one"); *Stansbury v. California*, 511 U.S. 318, 323 (1994) ("[T]he initial determination of custody depends

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[4] The Government takes issue with this characterization of the law in the Seventh Circuit (that nothing short of arrest or a decision to prosecute will trigger the statute of limitations) by pointing out that the Court of Appeals for the Seventh Circuit has yet to definitively resolve whether the statute of limitations begins to run as of the date of arrest or as of the date of actual discovery. Br. in Opp. 6-7. In reality, however, the date of actual knowledge will be the date of arrest in nearly every case.

on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."). Objective legal standards are far easier for courts to administer, and have the benefit of putting both individuals and law enforcement officers on notice of exactly what the law expects of them. Subjective standards, on the other hand, create uncertainties in the law, and often lead to unfair discrepancies from one case to the next. "An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine" subjective feelings. *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (citing *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004), and *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). There is no reason to reach a different conclusion in this context.

Five circuit courts of appeals have interpreted 8 U.S.C. § 1326 and 18 U.S.C. § 3282 in a way that enforces the statute of limitations duly enacted by Congress. The Seventh Circuit Court of Appeals has not. The difference between the objective, constructive knowledge standard and the subjective, actual knowledge standard is clear, and it is significant. The objective standard is easy for courts to apply consistently across cases, and protects aliens from having to defend against acts in the far distant past; the subjective standard results in uncertainty and unfair discrepancies. The objective standard furthers the goals of the statute of limitations by encouraging law enforcement and Government prosecutors to exercise due diligence and timely prosecute criminal conduct; the subjective standard discourages diligence

and excuses negligence, and cuts § 3282 out of the criminal code. Moreover, the objective standard and subjective standard often enough translate into different dates upon which a crime is complete. While those different dates may not always result in an untimely indictment, it can and it has—and it did here.

II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE CIRCUIT SPLIT

This case remains a suitable vehicle for reviewing the circuit split created by the Seventh Circuit Court of Appeals, even though the court below held that the Government did not have constructive knowledge of Mr. Gordon's presence after his entry at the border, because determining what constitutes constructive knowledge is part of the question presented to this Court for review.

Specifically, the question presented for review is whether the five-year statute of limitations for the crime of being "found in" the United States began to run in 1995 at the time that Mr. Gordon announced his presence and true identity to immigration authorities at the border. Pet. i. This is a question of *law* to be determined *de novo* by this Court based upon the undisputed facts below. *Toussie v. United States*, 397 U.S. 112, 124 (1970) ("The question in this case is not whether the five-year statute applies, but when it begins to run."). The results below are neither binding on this Court nor entitled to deference, and they are plainly wrong. The result in this case depends entirely on the legal standard adopted by this Court.

It is hard to imagine what additional information immigration authorities needed in November 1995 in order to discover Mr. Gordon's illegal presence in the

United States. Mr. Gordon presented immigration authorities with his own "green card," a Government-issued document bearing his true and accurate identifying information—his name, date of birth, alien registration number, fingerprint, and photograph. The green card, on its face, admitted that he was *not a citizen* (and thus might not have permission to enter). He presented it to immigration authorities *at the border*, giving it to agents who have the express duty to ensure that only those people with permission to enter the United States are allowed to enter the United States. Those agents had access to a computer database and lookout book at the border crossing that would have identified Mr. Gordon as a previously deported alien without permission to reenter.

Simply put, reasonable diligence must require more than merely looking at a document presented by a non-citizen at the border and waving him through. It must, at the very least, require those agents to stroke a few keys on a keyboard or flip a few pages in a book to determine if the alien has permission to enter.

The only other appellate court to address the constructive knowledge standard on similar facts has held that the statute of limitations began to run at the moment the alien entered the United States through a recognized port of entry. *DiSantillo*, 615 F.2d at 128. In *DiSantillo*, the defendant was an alien who previously had been arrested and deported from the United States. Once out of the country, he applied for and obtained a visa to enter the United States in his true name after incorrectly stating that he had only been excluded, not arrested and deported. He then entered the United States through a recognized port of entry by presenting his invalid visa bearing accurate

identifying information. The Third Circuit Court of Appeals concluded that the immigration authorities had constructive knowledge of his illegal entry—and that the statute of limitations began to run—at the moment he crossed through the port of entry because "immigration authorities knew of his entry and could have, through the exercise of diligence typical of law enforcement authorities, discovered his violation at that time." *DiSantillo*, 615 F.2d at 135-36.

The Government's citation to *United States v. Acevedo*, 229 F.3d 350 (2d Cir. 2000), for the opposite conclusion is inaccurate. While the defendant in *Acevedo* entered the United States with an authentic but invalid green card, as Mr. Gordon did here, the Second Circuit Court of Appeals did *not* hold, as the Government claims, that a "deportee's presentation of a green card rendered invalid by his prior removal does not charge government with constructive knowledge." Br. in Opp. 12. Rather, the court expressly declined to reach the issue of whether due diligence should have led to his discovery at the point of entry because the defendant did not "suggest that immigration authorities had available any equipment enabling them to conduct the necessary investigation." *Acevedo*, 229 F.3d at 355-56.

Contrary to *Acevedo*, Mr. Gordon has expressly set forth that immigration authorities at the border had access to a database that would have identified him as a previously deported alien. That fact has been uncontested at every stage of the proceeding and it was specifically cited by the district court, Pet. App. 29a, compelling a very different outcome here.

Furthermore, the only other case cited by the Government on this point, *United States v. DeLeon*,

444 F.3d 41 (1st Cir. 2006), also fails to support the conclusion that the Government lacked constructive knowledge of Mr. Gordon's presence. In *DeLeon*, the defendant had been convicted and deported under a false name, though he presented accurate identification when entering the United States at the border. On these facts, the First Circuit Court of Appeals concluded that immigration authorities had no way of knowing that Mr. DeLeon was the same man who previously had been convicted and deported from the United States. As the court explained in a significant passage omitted from the Government's brief: "[T]here can be no finding of lack of diligence *where it is deception by the alien as to his identity that has caused the government not to have knowledge of his presence.*" *Id.* at 52 (emphasis added to portion omitted in Br. in Opp. 12.)

Unlike the defendant in *DeLeon*, it is undisputed that Mr. Gordon was convicted and deported under his true name and alien number, and that the green card he presented at the border contained accurate identifying information. There was simply no deception "as to his identity" that could have prevented the government from gaining knowledge of his illegal presence.

In short, the undisputed facts of this case squarely and clearly present this Court with the opportunity to resolve the circuit split created by the Seventh Circuit when it held that constructive knowledge of an alien's illegal presence in the country is irrelevant to the running of the statute of limitations. If the Seventh Circuit is correct, then Mr. Gordon's indictment is timely. If the five other circuits are correct, however, and the constructive knowledge standard applies, Mr.

Gordon's indictment must be dismissed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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